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Eminent Domain--De Facto Taking

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of religion so that it could avoid the first amenment question of whether Congress can constitutionally exempt consciousious objectors from military service.[29]

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[29] It must be pointed out that there is a constitutional question involved in the conscientious objection cases. Section 6(j) of the Universal Military Training and Service Act does not exempt nonreligious conscientious objectors; consequently it could be argued that it discriminates between different forms of religious expression in violation of the first amendment's establishment and free exercise clauses and the due process clause of the fifth amendment. *See* Laurie, *Conscientious Objection—Some Constitutional Questions*, 73 W. VA. L. REV. 138 (1971).

Emient Domain—De Facto Taking

Defendant was notified that its property was in an area to be condemned for urban renewal. The proposed condemnation was initiated in 1954 but postponed until 1967, at which time defendant's property was formally condemned under the authority of a provision of the New York General Municipal Law[1] which authorizes a city to condemn property for urban renewal projects. During the interim the project was highly publicized; as a result, property in the area came into disrepair causing property values to decrease appreciably. Defendant was ordered to move from its property, which it did in April, 1963. By the time defendant moved its property had become unsalable and unrentable, but defendant continued to maintain it, pay taxes and carry insurance on it. The trial court held the city's actions constituted a *de facto* taking of defendan's property at the time defendant vacated it in 1963, and that defendant should be reimbursed for its expenses in maintaining the property until acquired by plaintiff in 1967. *Held* modified and affirmed. The condemning authority's actions so interferred with the defendant's use and ownership of the property that the essential elements of ownership were destroyed and a *de facto* taking occurred even though there was no physical invasion or legal

[1] N.Y. GEN. MUN. LAW § 555 (McKinney Supp. 1970) *amending* N.Y. GEN. MUN. LAW § 555 (McKinney 1965) provides:

> Real property or any interest therein, . . . necessary for or incidental to any urban renewal program or part thereof in accordance with an urban renewal plan may be acquired by an agency by gift, grant, devise, purchase, condemnation or otherwise and by a municipality for and on behalf of an agency by condemnation. Property may be acquired by condemnation by an agency or by a municipality for an agency pursuant to the condemnation law or pursauant to the laws relating to the condemnation of land by the municipality for which the agency is acting or the municipality, as the case may be.

restrain on the property. *City of Buffalo v. J. W. Clement Co.*, 34 App. Div. 2d 24, 311 N.Y.S.2d 98 (1970).

As a general rule, a taking occurs when a party with the power of eminent domain enters land with the intention to appropriate it. When there has been no physical invasion of the property, a taking occurs when title passes to the condemnor.[2] However, a taking may occur when governmental action is so complete as to deprive the owner of the indicia of ownership, use, and enjoyment of the property.[3] The Clement Court had to determine whether a *de facto* taking had occurred in the absence of a physical invasion of the property or a direct legal restraint upon its use.

The court first considered what constitutes a taking in a constitutional sense.[4] The court referred to the cases of *United States v. General Motors Corp.*[5] and *Forster v. Scott.*[6] The latter case held that a taking occurs when governmental action "deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the constitution."[7]

In this type of case the court in *Clement* said that a distinction must be made between those cases which allow the condemnee to establish damages using the value of his property before depression by the threat of the impending condemnation and those cases in which the condemnor's actions constitute a *de facto* taking prior to formal condemnation. While the court noted this distinction, it is difficult to apply it to earlier New York cases finding a *de facto* taking. In *City* of *Buffalo v. Strozzi*[8] a *de facto* taking was found when the city adopted a resolution to condemn property under an urban renewal plan, but had not commenced formal condemnation proceedings. No mention was made as to whether the *de facto* taking actually constituted a taking for which compensation would then be due or was merely the point at which reference would be

[2] Department of Pub. Works v. Wolf, 414 Ill. 386, 111 N. E.2d 322 (1953); *In re* Northern Pipe Line Co., 132 Pa. Super. 406, 1 A.2d 526 (1938).

[3] United States v. General Motors Corp., 323 U.S. 373 (1945); Southern Counties Gas Co. v. United States, 157 F. Supp. 934 (Ct. Cl. 1958).

[4] N.Y. CONST. art. I, § 7 provides: "Private property shall not be taken for public use without just compensation." Both the W. VA. CONST. art. III, § 9 and the fifth amendment of the Unied States Constitution are virtually the same.

[5] 323 U.S. 373 (1945).

[6] 136 N.Y. 577, 32 N.E. 976 (1893).

[7] *Id.* at 584, 32 N.E. at 977.

[8] 54 Misc. 2d 1031, 283 N.Y.S.2d 919 (Sup. Ct. 1967).

made to ascertain damages when the property was formally taken. It appears the court had the latter meaning in mind as it allowed no extra compensation to reimburse the owner for his expenses from the time of the so-called *de facto* taking, as was done in *Clement*.[9]

In *In re* 572 *Warren Street*[10] the condemning authority served notice of an intent to condemn and also sent letters to tenants advising them to move from the building. By the time of the formal condemnation the building had very little value, having been practically destroyed by vandals after the tenants moved out. The court held that damages were to be computed at the time of the condemnor's act when the building was fully rented and that a *de facto* taking occurred at that time. Although the Court's language was vague, it did award interest on the amount determined from the time of the *de facto* taking. It may have considered the condemnor's acts to constitute a taking rather than a mere point of time at which to estimate compensation.

In the post-*Clement* case of *New York State Electric & Gas Corp. v. Meredith*,[11] the court again held that a *de facto* taking occurred prior to the legal taking. This holding is distinguishable from *Clement* in that the condemnor in *Meredith* actually took and used the property prior to formal condemnation. The court said when the condemnor's actions are such that a *de facto* taking occurs the rights of the parties are fixed at that time; and the passage of title in a subsequent condemnation proceding merely marks the time at which payment is due.

The dissent in *Clement* relied upon *Niagara Frontier Building Corp. v. State*[12] and *Cicci v. State*[13] in finding that there were no acts which would constitute a *de facto* taking. In *Niagara* the court held that there was no *de facto* taking and further that there could be no recovery for the mere manifestation of an intention to con-

[9] *See In re* Town of Hempstead, 58 Misc. 2d 134, 294 N.Y.S.2d 809 (Sup. Ct. 1968). The court did not specify any action of the condemning authority which constituted a *de facto* taking; nor did it discuss any reasons to justify such a taking.

[10] 58 Misc. 2d 1073, 298 N.Y.S.2d 429 (Sup. Ct. 1968).

[11] 63 Misc. 2d 819, 313 N.Y.S.2d 216 (Sup. Ct. 1970). Plaintiff condemnor sought to amend the judgment of a condemnation proceeding to give the defendant a less restrictive easement, which would have allowed the condemnor's entry on the property. Plaintiff alleged that title to the property did not pass until a final judgment is entered in condemnation proceedings; therefore, if the judgment were amended title to the property would be in defendant. The court held that title had passed earlier because of plaintiff's physical invasion and subsequent use of the property.

[12] 33 App. Div. 2d 130, 305 N.Y.S.2d 549 (1969).

[13] 31 App. Div. 2d 733, 297 N.Y.S.2d 291 (1968).

demn or for a threat to condemn. The condemnor's only action in that case was the issuance of a letter expressing an intention to condemn. The letter had been sent to one of the tenants in the condemnee's building and was subsequently shown to the condemnee, who ordered all tenants to vacate the building and closed it. No other acts were committed by the state; therefore there was no *de facto* taking. However, in determining compensation at the formal condemnation proceedings, the court held the value of the property less the debilitating effect of the threat of condemnation was the proper measure of damages. In *Cicci* the appellate division overruled a trial court finding of *de facto* taking and held that there could be no taking absent entry on the property or an ouster of possession. The only action prior to condemnation was the revocation of a driveway permit. The dissent in *Clement* also relied upon *City of Buffalo v. George Irish Paper Co.*,[14] contending that there was no *de facto* taking. The majority in *Clement* properly placed that case among those allowing compensation to be measured in light of the value-depressing acts of the condemnor.

Other jurisdictions have recognized a *de facto* taking caused by action of a condemning authority which deprives a property owner of the use and enjoyment of his property. The much cited case of *In re Elmwood Park*[15] recognized a *de facto* taking caused by the threat of condemnation. The Michigan court said, "[A] city may not by deliberate acts reduce the value of private property and thereby deprive the owner of just compensation."[16] The court held that the city's reduction of general services in the area to be condemned did not constitute a *de facto* taking but that certain other acts[17] would have that effect. Another case reaching the same result is *Foster v. City of Detroit*[18] which held the condemnor's actions, "which substantially contributed to and accelerated the decline in value of plaintiffs' property constituted a 'taking' of plaintiffs' property within the meaning of the Fifth Amendment, for which compensation must be paid."[19] These decisions were fol-

[14] 26 N.Y.2d 869, 309 N.Y.S.2d 606, 258 N.E.2d 100 (1970) *aff'g* 31 App. Div. 470, 299 N.Y.S.2d 8 (1969).

[15] 376 Mich. 311, 136 N.W.2d 896 (1965).

[16] *Id.* at 317, 136 N.W.2d at 900.

[17] *Id.* The acts mentioned by the court were the sending of letters to tenants advising them of the impending condemnation, the filing of lis pendens, intense building code inspections and issuance of citations for violations, and the refusal to permit a long established business to continue in a building because it was to be condemned.

[18] 254 F. Supp. 655 (E.D. Mich. 1966) *aff'd* 405 F.2d. 138 (6th Cir. 1968).

[19] *Id.* at 665-66.

lowed in *Madison Realty Co. v. City of Detroit.*[20] In *Elmwood Park, Foster,* and *Madison Realty Co.,* the courts allowed the property owner extra compensation for maintaining the property from the time of *de facto* taking to the time of legal taking, which would imply that title, in effect, passed at the time of the *de facto* taking and all that remained was the payment of just compensation.

Past decisions by the West Virginia Supreme Court of Appeals on this subject are contrary to *Clement.* West Virginia has a statutory provision which provides that taking under eminent domain proceedings is complete when the condemnor pays the assessed compensation into court.[21] The leading West Virginia case on the point is *Buchannon & N. R.R. v. Great Scott Coal & Coke Co.*[22] The court in that case construed a section of the Code of 1913, idential to the present section, and said, "[T]he date of the actual taking of the land is the date when, after the report of the commissioners . . . or after verdict, if a jury is demanded, the money is actually paid to the owner, or into court. Until then the applicant is not permitted to put a foot on the ground."[23] The court also held compensation for property taken by eminent domain is determined as of the date of the taking. These rules have been followed by the court on numerous occasions.[24]

Of course, a direct invasion of private property by a condemning authority without payment is a taking.[25] "Property is taken, within the constitutional meaning, where it is materially impaired by something more than mere consequential injury, and which impairment renders it impossible for the owner to enjoy his property to the full extent to which he is entitled."[26] The court went further in *Fruth v. Board of Affairs,*[27] noting that an act by the

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[20] 315 F. Supp. 367 (E.D. Mich. 1970).

[21] W. VA. CODE ch. 54, art. 2, § 12 (Michie 1966) provides:

> [A]t any time within three months after the report, or the verdict of the jury . . . has been confirmed and ordered to be recorded, the sum so ascertained with legal interest thereon from the date of the report or verdict until payment, may be paid by the applicant into court; upon such payment, title to the property, or interest or right therein, so paid for shall be absolutely vested in the applicant. . . .

[22] 75 W. VA. 423, 83 S.E. 1031 (1914).

[23] *Id.* at 431, 83 S.E. at 1034.

[24] *E.g.,* State Road Comm'n v. Darrah, 151 W. Va. 509, 153 S.E.2d 408 (1967); State Road Comm'n v. Ferguson, 148 W. Va. 742, 137 S.E.2d 206 (1964); State *ex rel.* Wells v. City of Dunbar, 142 W. Va. 332, 95 S.E.2d 457 (1956); Cresapeake & O. Ry. v. Johnson, 137 W. Va. 19, 69 S.E.2d 393 (1952); Strouds C. & M. R. R. v. Herold, 131 W. Va. 45, 45 S.E.2d 513 (1947).

[25] 65 W. Va. 739, 65 S.E. 196 (1909).

[26] *Id.* at 743, 65 S.E. at 198.

[27] 75 W. Va. 456, 460-61, 84 S.E. 105, 108 (1915).

state or a municipality which "substantially interferes" with the owner's use and ownership of his property is a taking of such property without compensation and is prohibited by the West Virginia constitution.

The New York court in *Clement* noted that, in general courts have been reluctant to find a problem of a *de facto* taking. The court reasoned that this is probably because the problem has not often arisen. Today's widespread urban renewal projects and modern highway construction promise more and more *de facto* taking cases. At present the problem is not of great magnitude in West Virginia, though it may increase in the future. The West Virginia court might well look to *Clement* in fashioning a modern rule to provide appropriate relief to prevent serious injustice in situations involving the wholesale appropriation of property by eminent domain.

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Income Tax—Stock Redemption: "Essentially Equivalent To A Dividend"

In 1945 taxpayer and E. B. Bradley organized a corporation. In exchange for property contributions, Bradley received five hundred shares of common stock and taxpayer and his wife each received two hundred fifty shares. Taxpayer later purchased an additional one thousand shares of preferred stock at a par value of twenty-five dollars per share in order for the company to qualify for a federal loan, the corporation agreeing to redeem the preferred stock when the loan had been repaid. Before the redemption, taxpayer bought Bradley's five hundred shares and divided them between his son and daughter. Then in 1963, when the corporation redeemed the preferred stock, taxpayer, in his personal income tax return, did not report the twenty-five thousand dollars received by him as income. "Rather, taxpayer considered the redemption as a sale of his preferred stock to the company—a capital gain transaction under section 302 of the Internal Revenue Code resulting in no tax since taxpayer's basis in the stock equaled the amount he received for it."[1] The Commissioner disagreed with this and took

[1] United States v. Davis, 90 S. Ct. 1041, 1043 (1970). INT. REV. CODE OF 1954, § 302 provides that a redemption of stock by a corporation shall be treated as a distribution in part or full payment in exchange for the stock thus